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No. 87-1296

Supreme Court, U.S.

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JOSEPH F. SPANIOLO,
CLERK

In The
Supreme Court of the United States

October Term, 1987

— o —
IN RE EXXON CORPORATION,
THE BF GOODRICH COMPANY,
UNION CARBIDE CORPORATION,
MONSANTO COMPANY, and
TENNECO RESINS, INC.,

Petitioners.

— o —
**BRIEF IN OPPOSITION TO PETITION
FOR A WRIT OF MANDAMUS TO
THE SUPREME COURT OF NEW JERSEY**

— o —
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QUESTION PRESENTED

Are petitioners entitled to the interlocutory, extraordinary relief of a writ of mandamus where the Supreme Court of New Jersey gave full effect to the mandate of this Court in *Exxon Corp. v. Hunt*, 475 U.S. 355 (1986), and where review of the state court rulings will be available in the normal course once a final judgment is entered?

PARTIES TO THE PROCEEDING

Respondents agree with the parties to the proceeding set forth by petitioners, except to note the following changes in the state's executive officers: David Mack is now Acting Administrator of the New Jersey Spill Compensation Fund; Feather O'Connor is now Treasurer of the State of New Jersey; John R. Baldwin is now Director of the Division of Taxation; and Richard Dewling is now Commissioner of the New Jersey Department of Environmental Protection.

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The respondents, State of New Jersey, New Jersey executive officers, and Justices of the Supreme Court of New Jersey (including those Judges of the Appellate Division sitting by special designation), respectfully request that this Court deny the instant petition for a writ of mandamus to the Supreme Court of New Jersey.

COUNTERSTATEMENT OF THE CASE

The petition for the extraordinary writ of mandamus before this Court arises from the December 2, 1987 decision of the Supreme Court of New Jersey which found,

pursuant to the remand of this Court ordered in *Exxon Corp. v. Hunt*, 475 U.S. 355, 376 (1986), that as a matter of state law the preempted purposes of the Spill Compensation and Control Act, ("Spill Act"), N.J.S.A. 58:10-23.11 *et seq.*, were severable from the non-preempted purposes. The issue of severability was before the New Jersey Court on remand as a result of this Court's determination that § 114(c) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, worked but a *partial preemption* of the permitted uses of the tax money collected under the State Spill Act. *Exxon Corp. v. Hunt*, *supra*, 475 U.S. at 374-376. After deciding the issue of severability, and finding that the tax rate in effect through the period of preemption was supported by the non-preempted uses, the Supreme Court of New Jersey went on to establish parameters for a final remedy to be applied by the State Tax Court in further proceedings. The remedy crafted by the court below would authorize refunds to petitioners only if the New Jersey Legislature failed to reimburse the State Spill Fund—the recipient of the taxes paid by petitioners under the Spill Act—for all preempted expenditures made by the Spill Fund within six months of a final accounting of those preempted expenditures. Dissatisfied with the decisions of the New Jersey Supreme Court as to severability and remedy, petitioners are seeking immediate and interlocutory mandamus review in this Court instead of waiting for a final judgment to be entered from which appellate review would be available in the normal course. As a result of the filing of this petition for a writ of mandamus, the proceedings as to remedy before the Tax Court of New Jersey have been stayed

pending resolution of the petition. (Respondent's appendix ("R. App.") at 1a).

New Jersey's Spill Act, which remains a focus of this litigation, imposes a tax on major petroleum and chemical facilities to generate revenues to be credited to the Spill Fund for use in financing the prevention and cleanup of hazardous discharges within the state. *N.J.S.A.* 58:10-23.11f, g, h. The Spill Act took effect in 1977, more than three full years before Congress addressed similar cleanup and funding issues in CERCLA. As adopted, the Spill Act authorized Spill Fund expenditures for several purposes: 1) to finance governmental cleanup of hazardous waste, including oilspills; 2) to reimburse innocent third parties for cleanup costs; 3) to compensate innocent third parties for damage resulting from oilspills or other discharges of hazardous wastes; 4) to pay personnel and equipment costs; 5) to administer the Spill Fund; and 6) to conduct research.

In December of 1980, CERCLA took effect. In that legislation Congress imposed a tax on certain petroleum and chemical products to be credited along with appropriations from general revenues to a trust account known as "Superfund." These moneys are available to finance federal cleanups of hazardous waste sites, although oilspills are beyond the statutory coverage, as is a mandatory state share of at least 10% of remedial costs. 42 *U.S.C.* §§ 9601, 9604, 9611. Superfund financing for cleanups is further limited to those purposes designated by the United States Environmental Protection Agency ("USEPA") in the National Contingency Plan ("NCP"), which includes the National Priority List ("NPL"), a compilation of the

worst sites nationwide. 42 *U.S.C.* §§ 9604, 9605, 9611; 40 *C.F.R.* § 300.1 *et seq.* In addition, nongovernmental parties are ineligible to receive monetary awards from Superfund for damage caused by releases of hazardous substances. 42 *U.S.C.* §§ 9611, 9612. As even a quick comparison of CERCLA and Spill Fund's authorized uses shows, there are areas where state coverage exceeds that available from Superfund as well as areas of overlap.

Included by Congress in CERCLA was § 114(c) (42 *U.S.C.* § 9614(c)), the primary focus of this litigation. Section 114(c) was a preemption clause which stated in pertinent part that, "Except as provided in this chapter, no person may be required to contribute to any fund, the purpose of which is to pay compensation for claims for any costs of response or damages or claims which may be compensated under this subchapter." Congress removed this preemption clause from the statute in the Superfund Amendments and Reauthorization Act ("SARA"), *P.L.* 99-499, signed into law by the President on October 17, 1986. Based on the original § 114(c), however, petitioners instituted litigation in the Tax Court of New Jersey seeking the total preemption of the New Jersey Spill Tax and refunds of all of the taxes they had paid into the Spill Fund since the effective date of CERCLA. After each of three successive New Jersey courts upheld the Spill Tax, 4 *N.J. Tax* 294 (1982); 190 *N.J. Super.* 131, 462 *A.2d* 193 (App. Div. 1983), 97 *N.J.* 526, 481 *A.2d* 271 (1985), petitioners sought and obtained review from this Court.

This Court held that § 114(c) of CERCLA preempted in part the New Jersey Spill Act. *Exxon Corp. v. Hunt*,

475 *U.S.* at 358. The issues for determination addressed by the Court were the meaning and scope of CERCLA's preemption clause, and the preemptive impact of that statutory construction on the New Jersey Spill Fund. 475 *U.S.* at 363-364. After recognizing that § 114(c) was "not a model of legislative draftsmanship," 475 *U.S.* at 363, the Court concluded that the meaning of the provision could be ascertained only by reference to the remainder of CERCLA. *Ibid.* In scrutinizing the balance of the statute, the Court's primary focus was on categories of expenditures—those categories covered by CERCLA for which compensation from Superfund was available.

After analyzing CERCLA, this Court concluded that the NCP provided the criteria to determine "what expenses, at which sites, will be eligible for Superfund money." 475 *U.S.* at 374-375. As noted by the Court, the NCP specified that removal actions, or immediate cleanups, would be financed by Superfund only in emergency situations. 40 *C.F.R.* § 300.65. Remedial actions consistent with permanent remedies would be financed only for sites nominated by USEPA to the NPL, the list of the worst sites nationwide. 40 *C.F.R.* § 300.68(a). The Court thus used these regulatory parameters adopted by USEPA pursuant to CERCLA to define the categories of cleanup expenses "which may be compensated" by Superfund, and which—according to the Court's interpretation of § 114(c)—could not properly be duplicated as categories of expenditures from special state funds. 475 *U.S.* at 376. Even these parameters were not all-inclusive as to the scope of preemption, however, because the Court found that the state share of 10% or more of remedial costs

mandated by CERCLA as a prerequisite for Superfund action were not costs that could be compensated by Superfund. Consequently, federal preemption under § 114(c) did not extend to state fund financing of the state share of remedial costs.

The Court then applied this analysis to the Spill Act, concluding that the purposes of the state enactment were preempted only to the extent that they permitted “*expenditures*” beyond the state share “for remedial costs for sites on the National Priority List, or for removal costs that are eligible for Superfund compensation under the terms of the NCP. . . .” 475 *U.S.* at 376 (emphasis added). After so defining the scope of § 114(c) and its impact on the Spill Act, the Court stated that it was leaving to the New Jersey Supreme Court on remand “the state-law question whether, or to what extent, the non-preempted provisions of the statute are severable from the preempted provisions.” *Ibid.* There was no mention in the Court’s opinion of awarding tax refunds to petitioners. Following release of the opinion, this Court issued a mandate remanding the cause to the Supreme Court of New Jersey for “such proceedings . . . in conformity with the judgment of this Court. . . .” (Petitioners’ Appendix (“Pet. App.”) at 62a to 63a).

After receiving this mandate, the Supreme Court of New Jersey in turn remanded the case to the Tax Court “to develop a record and make such recommended findings and calculations as may be determined to be necessary to implement the mandate of the Supreme Court.” Jurisdiction, however, was otherwise retained. (Pet. App. 61a). On October 24, 1986, the Tax Court submitted its

recommendations pursuant to remand. (Pet. App. 27a to 61a). The recommendations addressed several key legal questions: prospective application of this Court's judgment (an issue raised on remand by the state); severability; the extent of refunds, if any; and the applicability of the State Tax Uniform Procedure Law, *N.J.S.A.* 54:14-14, to petitioners' demands for refunds. (Pet. App. 32a). Since all of these issues would have a significant impact on the calculation of preempted expenditures made by the Spill Fund, all parties agreed to submit them to the Tax Court for decision prior to undertaking an accounting. (Pet. App. 32a).

As to prospectivity, the Tax Court recommended that the decision of the Supreme Court of the United States be applied retroactively to the dates of the adoption of the NCP and the NPL—the regulatory “yardstick” established by this Court to determine those categories of expenditures that “may be compensated” by Superfund. The Tax Court also found as a matter of state law that the preempted purposes of the Spill Act were severable from the remainder of the statute. Specifically, the Tax Court concluded that the non-preempted purposes were identifiable and were “in no way dependent on the excised portions.” (Pet. App. 51a). It further recommended that any procedural deficiencies in petitioners' claims for refunds not bar the claims. The Tax Court also suggested that, following an accounting to determine all preempted expenditures made by the Spill Fund, the New Jersey Legislature should be given a reasonable period of time in which to reimburse the Fund for the improper expenditures. If, following such reimbursement, the amount of

money in the Spill Fund exceeded the statutory cap, the Tax Court recommended that the excess moneys be paid to petitioners. Should such reimbursement not be forthcoming from the Legislature, however, the Tax Court recommended that refunds be awarded to petitioners totalling the amount of preempted expenditures, with each petitioner to get a percentage reflecting its proportionate contribution to the total tax collected. (Pet. App. 59a to 60a).

Following receipt of these recommendations, the Supreme Court of New Jersey gave each side an opportunity to file exceptions. The court subsequently heard oral argument in the matter and, on December 2, 1987, issued its decision reviewing the Tax Court recommendations.

The Supreme Court of New Jersey approved and amplified the recommendations of the Tax Court, with some slight modifications. (Pet. App. 1a to 26a). As the basic premise of its opinion, the Supreme Court of New Jersey fully accepted this Court's determination that "the tax levied by the Spill Act was imposed for certain purposes that were preempted by CERCLA, as well as for other purposes not preempted by CERCLA." (Pet. App. 2a). The New Jersey Supreme Court also recognized that, "the Spill Act was preempted by § 114(c) of CERCLA to the extent that the Act authorized expenditures, beyond the mandatory state share, 'for remedial costs for sites on the National Priority List, or for removal costs that are eligible for Superfund compensation under the terms of the NCP.' " (Pet. App. 7a, quoting *Exxon Corp. v. Hunt*, 475 U.S. at 376). Indeed, the opinion below demonstrates that the New Jersey Supreme Court examined this Court's opinion carefully, quoted from it liberally, and viewed the

entire remand squarely in light of the conclusions reached by this Court. *See e.g.*, Pet. App. 2a to 7a.

The first issue addressed by the court below was severability:

In this unusual setting, the inquiry is whether the Legislature would have intended the non-preempted portions of the Spill Act, including the tax rate, to remain in effect notwithstanding the determination that significant statutory purposes were preempted by CERCLA *for a limited period*. [Pet. App. 8a, emphasis in original.]

After posing this question, the court went on to analyze the Spill Act and concluded that severability was warranted as “manifestly consistent with the legislative intent.” (Pet. App. 12a). The court further found that the Spill Act “makes sense” with or without the preempted purposes, and thus stands as a matter of state law despite the portions excised by this Court in *Exxon Corp. v. Hunt*, 475 U.S. at 374-376. (Pet. App. 7a to 12a). In reaching this conclusion, the New Jersey Supreme Court rejected petitioners’ claims that severability was inappropriate because all of the statutory objectives had been financed by the same tax rate. (Pet. App. at 8a to 11a).

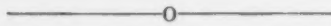
The New Jersey Supreme Court next addressed the period and scope of preemption. Like the Tax Court, it rejected the state’s prospectivity argument, endorsing instead the Tax Court’s recommendation that the adoption of the NCP and NPL marked the critical dates on which preemption should be deemed to commence. (Pet. App. 15a). This finding was based explicitly upon this Court’s determination that the NCP and NPL furnished the “ap-

propriate test” for determining preemption. (Pet. App. 17a to 18a, quoting 475 *U.S.* at 374). Next, the New Jersey Supreme Court established October 17, 1986—the date SARA was enacted and § 114(c) of CERCLA was repealed—as the end date of preemption, rejecting the state’s argument that the proper deadline was September 30, 1985, the date on which the taxing authorization under CERCLA expired. 42 *U.S.C.* § 9653 (1985) (Pet. App. 18a). The court noted for bookkeeping and accounting purposes that expenditures would be preempted only if the commitment of Spill Fund money was made subsequent to the promulgation of the NCP or NPL. After establishing these parameters, the court remanded the case once again to the Tax Court for an accounting to determine the exact amount of Spill Fund expenditures preempted by CERCLA. (Pet. App. 18a to 19a).

As to remedy, the court endorsed most of the Tax Court’s recommendations as responsive to the peculiar circumstances of this case where the Spill Tax was only partially invalidated, and even that partial invalidation was only for a limited time. (Pet. App. 20a). After analyzing the projected needs of the Spill Fund for non-preempted uses, recent legislative amendments to the Spill Act increasing the Fund’s tax base, and the congressional repeal of § 114(c), the court concluded that, “In our view, reimbursement of the Spill Fund from non-Spill Act revenues vindicates the Spill Fund’s payment of preempted expenses in a manner most consistent with the objectives of Congress and the Legislature.” (Pet. App. 25a). However, if the Legislature does not reimburse the Spill Fund within six months of a final accounting, petitioners are

entitled to *pro rata* refunds of the preempted expenditures. (Pet. App. 25a to 26a). Since the New Jersey Legislature had repealed the cap limitation provided in the original Spill Act, the court found the Tax Court's ruling on that point to be no longer appropriate. (Pet. App. 26a). The New Jersey Supreme Court then remanded the case back to the Tax Court for further proceedings consistent with its opinion. (*Ibid.*). It did not retain jurisdiction.

Despite the availability of appeal at the conclusion of the remand, and despite the adherence by the Supreme Court of New Jersey to the mandate of this Court, petitioners are seeking interlocutory review by requesting the issuance of an extraordinary writ of mandamus to correct alleged errors made below. Since there is no final judgment and since none of the exceptional circumstances required by *Sup.Ct.R.* 26 for the issuance of a writ of mandamus are present here, respondents submit that the writ must be denied.



REASONS FOR DENYING THE WRIT

1. **Mandamus Relief Is Unavailable Here Because The Review Sought Is Interlocutory In Nature And Thus Inconsistent With The Final Judgment Rule.**

It is a truism that the writ of mandamus may not be used as a substitute for appeal. *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 25-31 (1943). Normally, a final judgment is a necessary prerequisite to appellate review of state court judgments in this Court. 28 U.S.C. § 1257. Were interlocutory review of nonappealable orders to be

granted freely under the guise of mandamus, such action would undermine the strong congressional and judicial policies against piecemeal litigation and in favor of limiting appellate jurisdiction to final judgments. *Ibid.* See generally, *Roche v. Evaporated Milk Ass'n*, *supra*, 319 U.S. at 30; *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34-36 (1980).

Where nonfinal judgments are subject to appeal in the normal course of judicial proceedings, mandamus ordinarily will not be granted. *Roche v. Evaporated Milk Ass'n*, *supra*, 319 U.S. at 28-30. *Will v. United States*, 389 U.S. 90, 96-97 (1967). Moreover, inconvenience to the parties resulting from enforcement of the final judgment rule will not justify the issuance of a writ of mandamus. In *Roche v. Evaporated Milk Ass'n*, for example, the Court held that mandamus was unavailable to alleviate the inconvenience of a party who would have to proceed to trial prior to final resolution of an important legal issue. 319 U.S. at 30. See also *Ex parte State of Texas*, 315 U.S. 8, 13-14 (1942), where the Court denied a petition for a writ of mandamus to correct an alleged misapplication of its mandate on remand despite recognizing that "petitioners were naturally eager for a prompt correction of the decision of [the court below], even though it was not final, without waiting for this rate controversy, already eight years old, again to wind its measured way through the Texas courts and then to be brought here. . . ." Eagerness for a quick decision from this Court to avoid inconvenience thus simply cannot justify deviation from the final judgment rule. These principles require the dismissal of petitioners' attempt to obtain interlocutory review of a decidedly nonfinal order.

There is no final judgment before this Court. The December 2, 1987 decision of the New Jersey Supreme Court which is the subject of this petition remanded the case to the Tax Court for an accounting of preempted expenditures. Such an accounting will be complex, and will require the exercise of judgment by the Tax Court. First, many factual determinations must be made, using the rulings of the New Jersey Supreme Court as to the scope and duration of partial preemption as guidelines. For example, the Tax Court will have to establish the dates on which tax moneys were committed for preempted purposes at particular sites prior to ascertaining the total amount of improper expenditures. In addition, pursuant to the explicit direction of the New Jersey Supreme Court, the Tax Court must also evaluate the eligibility of removal actions for Superfund coverage whenever the record reflects that USEPA had not previously made such a determination. (Pet. App. 19a, n.4). Numerous other factual and legal issues may arise as the parties and the Tax Court analyze millions of dollars of expenditures made by the Spill Fund at more than 100 sites during the period of preemption. Where the proceedings yet to be conducted are so significant, and are far from being simply ministerial in nature, review from this Court is not available until a final judgment is entered. *See generally, Minnick v. California Dept. of Corrections*, 452 U.S. 105, 120-125 (1981); *Republic Natural Gas v. Oklahoma*, 334 U.S. 62, 67-72 (1948); *California National Bank v. Stateler*, 171 U.S. 477 (1898). Once the accounting is completed and a final judgment entered, however, appellate review will be available in the normal course. *N.J. Court Rules, R. 2:2-3(1)*; 28 U.S.C. § 1257(c). At that time petitioners will be able

to raise the issues they are pursuing here as well as any other questions that may arise in the course of the accounting.

The principles of comity and federalism also support restraint by this Court until the state judicial processes have been concluded in a final judgment. See generally the discussion of these principles in *Lemon v. Kurtzman*, 411 U.S. 192, 208 (1973), citing *Younger v. Harris*, 401 U.S. 37 (1971).

Petitioners have simply failed to present any compelling reasons to support deviation from the final judgment rule. No irreparable harm absent immediate and interlocutory intervention by this Court has been alleged; nor could it be since the relief requested is monetary in nature, namely a tax refund. Indeed, no damage of any significance would result to petitioners if they are denied mandamus review and are required to pursue their claims on appeal after the entry of a final judgment. Compare, *DeBeers Consolidated Mines, Limited v. United States*, 325 U.S. 212 (1945), where an extraordinary writ was issued to set aside a sequestration order, on the ground that damage done during the pendency of the order could not be repaired on appeal from a final judgment. Absent any such compelling circumstances, interlocutory review is not justified. This Court must consequently reject petitioners' attempt to use mandamus as a substitute for the appellate processes that will be available upon the entry of a final judgment.

**2. The Absence Of Exceptional Circumstances
Requires The Court To Deny The Petition
For A Writ Of Mandamus.**

This Court has made it clear that, "The remedy of mandamus is a drastic one, to be invoked only in extraordinary circumstances." *Kerr v. United States District Court*, 426 U.S. 394, 402 (1976). Indeed, in *Allied Chemical Corp. v. Daiflon, Inc.*, *supra*, 449 U.S. at 36, the Court noted that a long line of its precedents had answered the question as to the availability of mandamus with the refrain, "What, never? Well hardly ever!" The Court's own rules echo the limited availability of mandamus: "The issuance by the Court of any extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised." *Sup.Ct.R.* 26. To qualify for the issuance of a writ, petitioners must demonstrate that "the writ will be in aid of the Court's appellate jurisdiction, that there are present exceptional circumstances warranting the exercise of the Court's discretionary powers, and that adequate relief cannot be had in any other form or from any other court." *Ibid.*

There is nothing "extraordinary" about the New Jersey Supreme Court's exercising the discretion committed to it by this Court in the remand proceedings. Indeed, such a result was contemplated—explicitly as to severability and implicitly as to refunds—in this Court's opinion in *Exxon Corp. v. Hunt*, 475 U.S. at 358 to 377. That the court below has now exercised that discretion to petitioners' dissatisfaction is no justification for granting the extraordinary writ of mandamus. *See generally, Ex parte State of Texas*, *supra*, 315 U.S. at 11-14; *Roche v.*

Evaporated Milk Ass'n, supra, 319 U.S. at 25-31; *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 663-667 (1978).

It is useful to compare the situation here to the truly extraordinary circumstances present in the cases cited by petitioners where the lower courts did the "inconceivable": that is, took action in clear and unmistakable derogation of a mandate of this Court. *General Atomic Co. v. Felter*, 436 U.S. 493 (1978) (where this Court held that a party had a federal right to pursue arbitration, mandamus would lie to correct state court injunction on remand curtailing party's federal arbitration rights); *Deen v. Hickman*, 358 U.S. 57 (1958) (where this Court had sustained finding of negligence, mandamus would lie to prevent lower court from reopening the issue); *Bucolo v. Adkins*, 424 U.S. 641 (1976) (where this Court found that the materials used to support an obscenity conviction were not obscene, mandamus would lie to prevent lower courts from conducting any further proceedings against defendants regarding violation of the state's obscenity statute). These precedents cannot assist petitioners because what occurred here was not only "conceivable," but anticipated—the exercises of discretion made below were contemplated by this Court in its opinion and mandate. Under these circumstances, there is nothing "extraordinary" to justify issuance of a writ of mandamus.

Moreover, a corollary to the "exceptional circumstances" doctrine is that petitioners must demonstrate that their right to mandamus is "clear and indisputable." *Will v. United States, supra*, 389 at 96; *Allied Chemical Corp. v. Daiflon, Inc., supra*, 449 U.S. at 35-36. Petitioners have not made such a showing here, and it is hard

to see how they could given the circumstances of this case. First, this Court remanded the issue of severability to the New Jersey Supreme Court, and explicitly recognized that severability was an issue of *state law*. 475 *U.S.* at 376. Severability was thus committed to the sound discretion of the court below. Next, this Court left open the issue of remedy, thereby submitting it as well to the sound discretion of the New Jersey Supreme Court. Since, “[w]here a matter is committed to discretion, it cannot be said that a litigant’s right to a particular result is ‘clear and indisputable,’ *Allied Chemical Corp. v. Daiflon, Inc.*, *supra*, 449 *U.S.* at 36, mandamus is unavailable to review the interlocutory exercises of discretion made below. *See also, Will v. Calvert Fire Inc. Co.*, *supra*, 437 *U.S.* at 665-666 (1978).

3. Mandamus Is Unwarranted Because the Determinations on Remand of the Supreme Court of New Jersey are Completely Consistent With the Mandate of this Court.

The first issue addressed on remand by the New Jersey Supreme Court was the issue of severability. (Pet. App. 7a to 13a). This Court not only directed the New Jersey Supreme Court to determine whether the preempted purposes could be severed from the remainder of the Spill Act, but also recognized that the issue was purely one of *state law*. 475 *U.S.* at 376. The fact that severability is a state law issue defeats petitioners’ claim to mandamus relief on this point for, under *Sup.Ct.R.* 26, the writ of mandamus must be in aid of the Court’s appellate jurisdiction, 28 *U.S.C.* § 1257, and a state law is-

sue is obviously not within that jurisdiction.* For the same reason, a conclusion on a state law issue cannot furnish the extraordinary grounds necessary for a writ of mandamus to issue. *See Ex parte State of Texas, supra*, 315 U.S. at 14.

Petitioners fare no better in arguing that the New Jersey Court's treatment of the issue of remedy justifies a writ of mandamus because that issue was left open by this Court. On remand, any matter left undecided by this Court may be considered and determined by the court below. *In Re Sanford Fork and Tool Co.*, 160 U.S. 247 (1895). Moreover, the decision of a lower court on remand as to issues left open by this Court's mandate can be reviewed only by a new appeal, and not through the interlocutory and extraordinary writ of mandamus. *Ibid.*; *Perkins v. Standard Oil Company of California*, 399 U.S. 222 (1970); *Sprague v. Ticonic Nat. Bank*, 307 U.S. 161 (1939). As the Court stated in *Ex parte Union Steamboat Co.*, 178 U.S. 317 (1900), "The inferior court is justified in considering and deciding any question left open by the mandate and opinion of this court, and its decision upon such matter can only be reviewed upon a new appeal to the proper court. . . ." These precedents compel the dismissal of the instant petition.

Even beyond application of these general principles, mandamus is unwarranted here because the remedial pa-

* Petitioners strain to find a federal question lurking in the issue of severability. That position is foreclosed by decisions of this Court. *Charles Wolff Packing Co. v. Court of Industrial Relations*, 267 U.S. 552, 562 (1925). *See also, Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 337 n.15 (1977).

rameters established by the Supreme Court of New Jersey were based upon and derived from the judgment of this Court in *Exxon Corp. v. Hunt*. The very starting point of analysis used by the court below was the determination by this Court that CERCLA partially preempted the uses to which the entire Spill Act Tax could be put. Despite Exxon's protestations to the contrary, the ruling did not require invalidation of the Spill Fund Tax. While we agree with petitioners that this Court held that the actual expenditures made by the Spill Fund were irrelevant for the purpose of statutory construction—that is, deciding what § 114(e) meant—it does not follow from this conclusion that expenditures are irrelevant for the purpose of remedy. Nothing in the opinion of this Court supports petitioners' position in this regard. In fact, the finding of partial preemption, tailored as it was to sites on the NPL and to emergency response actions covered by the NCP, actually invites concentration on preempted expenditures as the most reasonable and practical way to establish an equitable remedy. The court below thus reasonably decided that the monetary amount of any remedy should be equal to the amount of expenditures actually made for preempted uses. Such an approach is completely consistent with this Court's finding of partial preemption, and also flows from the decision of the Supreme Court of New Jersey that the non-preempted uses of the Spill Act were sufficient to support the original tax rate. While petitioners claim that this Court's decision requires a remedy amounting to the refund to them of all of the taxes they paid during the period of partial preemption, there is no support in this Court's opinion for their assertion. Indeed, the very remand of the severability issue

to the New Jersey Supreme Court without any mention of remedy completely undermines petitioners' argument.

Petitioners assert that the entire tax must fall because it contains a single tax rate which cannot be severed. Had this been this Court's view, presumably it would have said so, thereby concluding the matter without the necessity of a remand. Plainly, the Court's holding of partial preemption, focusing on expenditures for preempted purposes rather than upon tax collections, amply justifies looking beyond the tax rate to expenditures by the Spill Fund. If petitioners were correct, no taxing act found partially invalid and containing a single tax rate could be severed.

As to the period of preemption, the Supreme Court of New Jersey relied upon this Court's ruling that the proper test of Superfund eligibility was the NCP, including the NPL. It consequently used the promulgation dates of those regulations as the starting dates for calculating all preempted expenditures. Certainly, this approach is consistent with this Court's opinion and represents a reasonable and practical accommodation to the regulatory gap caused by USEPA's failure to adopt the NCP and NPL in the timely manner directed by Congress. *See*, 42 U.S.C. § 9605. Petitioners have no quarrel with the end date of preemption employed below—October 17, 1986, when SARA took effect and repealed the preemption clause.

Finally, the court below held that once the preempted expenditures were calculated, petitioners were not immediately and automatically entitled to refunds totalling that amount. Rather, given the highly unusual circumstances of this case of partial preemption, the court be-

low gave the New Jersey Legislature six months from the date of final accounting to reimburse the Spill Fund out of general revenues or some other appropriate source for all expenditures made in violation of CERCLA's preemption clause. Only if reimbursement is not made within the stipulated period will petitioners be entitled to *pro rata* refunds totalling the amount of preempted expenditures.

It is this holding that petitioners simply refuse to accept. In response, they argue that, from the beginning, the primary focus of this litigation has been tax refunds. Such an assertion is disingenuous, however, for the *only* focus of this litigation from its inception through the opinion and mandate of this Court was statutory construction: what § 114(c) of CERCLA meant and how that provision affected the New Jersey Spill Act. Only after this Court answered these pivotal questions of statutory interpretation and remanded the matter to the Supreme Court of New Jersey did the issue of tax refunds become a serious judicial concern. And, since this Court left open the question of ultimate remedy, the court below properly addressed and decided it on remand. As noted earlier, mandamus does not lie to review an issue left open by this Court. *In Re Sanford Fork and Tool Co., supra*, 160 U.S. at 247; *Ex parte Union Steamboat Co., supra*, 178 U.S. at 317.

Furthermore, the remedy devised by the Supreme Court of New Jersey takes full account of the partial preemption found by this Court and redresses any injury caused by the improper expenditure of Spill Fund moneys. As the Court noted in *Lemon v. Kurtzman, supra*, 411 U.S. at 200, "In shaping equity decrees, the trial court

is vested with broad discretionary power; appellate review is correspondingly narrow. . . . Moreover, in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair and what is workable." (Citations and footnotes omitted). Although petitioners have argued that CERCLA removes the power of the court below to shape an equitable decree responsive to the statutory violation in issue, to public need, and to legislative intent, it is clear that such a major departure from the long tradition of equity practice should not be implied. See *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-320 (1982); *Hecht Co. v. Bowles*, 321 U.S. 321, 330 (1944). Petitioners' reliance on *T.V.A. v. Hill*, 437 U.S. 153 (1978), to defeat the traditional equitable discretion of the court below is unavailing. For it was the nature of the statute in issue in *Hill* which unequivocally barred construction projects in critical habitats that curtailed the Court's discretion regarding progress of the project when a critical habitat was discovered. Here, contrariwise, there is nothing in the history or language of CERCLA that similarly curtails the traditional equity powers of a court to shape relief following a finding of partial preemption. There is absolutely no language in the now repealed § 114(c), for example, that requires or even suggests that tax refunds be given to petitioners if partial preemption is found. Under such circumstances, the court below was empowered to do exactly what it did: use its equitable discretion to formulate a remedy responsive both to the constitutional violation in issue and to the highly unusual circumstances of this case. Its resolution of the many competing interests at stake was both reasonable and appropriate.

Finally, despite petitioners' contentions to the contrary, neither the decision below nor the actions of state officials in administering the Spill Act "flout federal law." Rather, both the Supreme Court of New Jersey and state officials admirably came to terms with the intricacies and complexities of two different but partially overlapping statutory schemes, an inartfully drawn preemption clause, and an eventual holding from this Court of partial preemption. As far as the state executive officials are concerned, they were faced for several years with an existing state statute, the questionable impact of CERCLA on that statute, and a series of state court decisions upholding the Spill Fund Tax. Given these circumstances, they proceeded with reasonable caution and some reasonable uncertainty to administer the Spill Fund under the cloud of possible preemption. This process, detailed in the affidavit of Robert Hunt, former Administrator of the Spill Fund (submitted to the Tax Court and reprinted at R. App. 3a to 9a), was anything but easy, and reflects an intense desire to comply with federal law so as to minimize any risk to the Spill Fund.* As to the

* Petitioners' contention that the majority of expenditures from the Spill Fund both before and after this Court's decision were for preempted purposes is simply wrong. See generally the affidavits of Robert Hunt (R. App. 3a to 9a) and David Mack (R. App. 10a to 16a). Petitioners rely for this assertion upon their own interpretations of information provided by the Spill Fund. The New Jersey Tax Court on remand noted the unreliability of these interpretations when it stated that, "It further appears that plaintiffs have not thoroughly analyzed nor utilized all of the information supplied on which they rely. By way of example, it appears that the figures recited for the projects targeted by plaintiffs do not necessarily represent what plaintiffs imply . . . The figures represent the total amounts spent at any site which has ever been included on the NPL including money

Supreme Court of New Jersey, it crafted a remedy designed to give full effect to this Court's holding of partial preemption, while still recognizing the needs of the public and the intents of Congress and the New Jersey Legislature. Federal law undoubtedly was vindicated. Mandamus is consequently unavailable.

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CONCLUSION

For all of the foregoing reasons, this Court should deny the instant petition for a writ of mandamus.

Respectfully submitted,

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March 7, 1988

(Continued from previous page)

spent prior to December 1980 (effective date of CERCLA) and certainly prior to the adoption of the revised NPL" (Pet. App. 45a). Only a complete accounting on remand will provide the facts necessary to analyze and evaluate petitioners' claims. Their contentions are thus unworthy of consideration at this time, and emphasize the importance of requiring a final judgment before undertaking appellate review.

APPENDIX



APPENDIX A

**SUPERIOR COURT OF NEW JERSEY
(SEAL)**

John F. Evers, J.S.C. T/A

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January 13, 1988

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Re: Exxon Corporation v. Hunt

Dear Counsel:

This will confirm the fact that the conference which was scheduled for January 13, 1988 has been adjourned without date. It is my understanding that plaintiffs have filed an appeal with the United States Supreme Court from the decision of the New Jersey Supreme Court. Pending the outcome of that appeal this court will take no further action concerning this matter. However it would

2a

be appreciated if you would keep me advised of the status of the pending appeal.

Very truly yours,

/s/ John F. Evers
JOHN F. EVERS, J.S.C.

JFE/ccf

APPENDIX B

W. CARY EDWARDS
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TAX COURT OF NEW JERSEY
 ON REMAND FROM THE
 SUPREME COURT OF
 NEW JERSEY
 DOCKET NO. A-66
 September Term 1984

EXXON CORPORATION, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action
)	
ROBERT HUNT,)	AFFIDAVIT OF
ADMINISTRATOR OF THE)	ROBERT E. HUNT
NEW JERSEY SPILL)	
COMPENSATION FUND, <i>et al.</i> ,)	
)	
Defendants.)	
STATE OF NEW JERSEY)	
)	ss
COUNTY OF MERCER)	

ROBERT E. HUNT, of full age, being duly sworn
 according to law, upon his oath deposes and says:

1. From January 1978 until January 1986 I was the administrator and chief executive of the New Jersey Spill Compensation Fund. As administrator of the Fund, I was responsible for all of the expenditures paid out of the Fund. In this regard, I supervised a staff which assisted me in authorizing expenditures, reviewing, auditing, and approving individual invoices relating to cleanup actions; adjusting and settling damage claims against the Fund; and reviewing contract terms relating to cleanup agreements with outside contractors. In the course of these activities, I maintained records of all expenditures made by the Fund. I also was involved in New Jersey's applications for federal funds related to the cleanup of hazardous substances, both under the federal Superfund legislation and the earlier federal water pollution control legislation.

2. Upon the adoption of the Superfund Act in December 1980, I became concerned about the impact of the preemption language on the spending alternatives of the Spill Fund. In order to get judicial guidance on the meaning of the preemption language and, in turn, to give me guidance in regard to Spill Fund expenditures, the Attorney General of New Jersey filed a lawsuit in federal court in Washington, D.C., seeking a definitive interpretation of the preemption language. This lawsuit was eventually dismissed, and the Attorney General pursued the scope of the preemption issue in state court in an action brought by several petrochemical companies to invalidate the Fund on preemption grounds. Pending resolution of this state court action, *Exxon v. Hunt*, the Division of Taxation continued levying and collecting the Spill Fund

Tax, and I continued to authorize expenditures from the Fund.

3. In light of the preemption language in the statute and the pending litigation, however, I began to scrutinize Fund expenditures much more closely, particularly after April 1981 when the federal tax was first collected under CERCLA. Where federal funding under the Superfund Act appeared likely at a New Jersey site, it became my practice not to authorize expenditures from the Spill Fund. Where federal funding was unlikely, or where the New Jersey Department of Environmental Protection informed me that emergency conditions existed and immediate cleanup action was necessary, I would authorize expenditures from the Spill Fund, as discussed in more detail below.

4. Decisions on appropriate expenditures were particularly hard to make after April 1981 and during the first four months of 1982 because the scope of the federal program had not been defined and Superfund financing decisions appeared to be made by EPA on a case by case basis. In fact, there was virtually no money available from Superfund during this time and no real guidance from USEPA as to what activities would eventually be funded. Although Congress had directed that the Superfund program be implemented through a revised National Contingency Plan ("NCP") to be adopted by June 1981, EPA never met this deadline and the NCP, revised pursuant to CERCLA, was not even published until July 1982. (EPA action in regard to the NCP was brought about, in part, by a lawsuit filed by New Jersey in which the State obtained an injunction compelling the Agency to adopt the

Plan.) Once published in July 1982, the NCP limited Superfund expenditures for remedial (complete long-term clean up) actions to sites on the National Priority List ("NPL") which was to be a compilation of the worst sites nationwide. However, EPA did not officially promulgate the NPL until September 1983, more than a year after the NCP was first published. This delay created further uncertainty for the Spill Fund because of the lack of a determination as to what sites and actions would be eligible for Superfund financing.

5. Due to this significant void in federal guidance, we in New Jersey felt that we had to be prepared to use the Spill Fund to address pressing State priorities even if we were risking the possibility of some conflict in regard to the preemption language contained in the Superfund Act. The bottom line was that we felt we had no real choice in the matter in many instances. Adding to the difficulties encountered, was the fact that on some occasions, when we asked EPA officials whether Superfund would provide financing for a New Jersey site, we were told that there was no money available at that time. At times, EPA simply did not reply to written requests for a decision on whether funding would be available. We did not know in these circumstances whether to spend Spill Fund monies or wait for a more definite response from EPA. On occasion it was unclear whether a particular cleanup action would ever be eligible for Superfund financing.

6. In order to have some basis on which to make funding decisions, I applied an informal, internal set of guidelines during the period from April 1981 until Sep-

tember 1984 when the New Jersey Supreme Court issued its decision in this matter. Expenditures were authorized (1) for emergency actions when Spill Fund staff had received at least a verbal response from EPA that funds would not be available in the reasonably foreseeable future; (2) for exploratory activities necessary to identify the existence and scope of a discharge problem and to establish justification of a request for Superfund financing; (3) for general maintenance such as monitoring, guard service, and security fences; and (4) for matching state funds when federal money was available under a federal program other than Superfund.

7. In April of 1982, Spill Fund spending decisions became somewhat easier because the New Jersey Tax Court held that expenditures out of the Spill Fund were appropriate except where Superfund financing was actually provided. Based on this decision, the Spill Fund had greater confidence about its right to spend Fund revenues to supplement the federal program, and to pick up the slack that was being left by EPA in regard to many New Jersey sites. The fact that Exxon appealed the Tax Court decision did continue to make us careful about spending decisions, however, because we knew refunds of tax revenues were being sought and we did not want to jeopardize Spill Fund moneys unnecessarily. Despite the Tax Court ruling, therefore, we continued to carefully monitor EPA's funding decisions and to focus Spill Fund expenditures in those areas described in the previous paragraph where EPA was not expected to provide financing, or was not expected to provide financing quickly enough to meet New Jersey's pressing needs.

8. The situation at the Chemical Control Corporation plant in Elizabeth provides an example where cleanup efforts began under the Spill Act before Superfund became effective in December 1980 but necessarily had to continue even after the CERCLA tax was first collected in April 1981, even though it was likely that Superfund financing might eventually be available for the site. In April 1979 NJDEP closed the plant after officials found thousands of unmarked barrels of chemicals stored on the property, many of them damaged and leaking. On April 22, 1980 the barrels caught fire and exploded, sending clouds of chemical smoke into the air. NJDEP began cleanup work in 1979 and continued until June 1981 when the bulk of the work was completed. Since that date work at the site has been mainly for maintenance. It would have been absurd for NJDEP to cease work at the site in April 1981 based on a speculative federal program, particularly in the face of proven danger, need to take immediate action and the availability of readily accessible money in the Spill Fund. By June 30, 1981, more than \$20 million had been spent by the Spill Fund for cleanup of Chemical Control. Many of the invoices for work done before April 1981 were paid after that date. It would be extremely difficult, if possible at all, to determine which expenditures were for work completed or contracted for before April 1981 but paid after that date.

9. Numerous other examples can be given for sites where significant amounts of Spill Fund moneys were spent for cleanup at a site which was eventually put on the NPL. Such pre NPL expenditures were justified because of the real and potential harm to the public and the environment posed by the unremediated discharges and the lack of federal funding. In these instances also it will

be very difficult to determine which invoices paid after a site was listed on the NPL were for work done before listing.

10. As the years progressed, the federal program became more defined through the adoption and actual implementation of the NCP and NPL. In addition, as the Tax Court decision was affirmed first by the Appellate Division and then by the New Jersey Supreme Court, we felt more confident about spending Spill Fund moneys for sites where federal compensation had not been provided. One area of spending that continued to trouble us even after the State Supreme Court decision, was where a site was on the NPL, but where EPA clearly indicated no federal funding was available, and none looked likely in the foreseeable future. In such circumstances, if the cleanup work in question was deemed essential to protect the people and environment of New Jersey, the Spill Fund would provide money to finance such work. I fully believed that such expenditures were consistent with the State court rulings which authorized the Spill Fund to spend for work not actually compensated by the federal Superfund. Again, where environment or population was in danger, I felt we had no other choice.

/s/ Robert E. Hunt
Robert E. Hunt

Sworn and Subscribed to
before me this 16th day
of July 1986

/s/ Hillary A. Peterson, Esq.

An attorney at law in the
State of New Jersey

APPENDIX C

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TAX COURT OF NEW JERSEY
 ON REMAND FROM THE
 SUPREME COURT OF NEW JERSEY
 DOCKET NO. A-66 September
 Term 1984

EXXON CORPORATION, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action
)	
ROBERT HUNT,)	AFFIDAVIT OF
ADMINISTRATOR OF THE)	DAVID MACK
NEW JERSEY SPILL)	
COMPENSATION FUND, <i>et al.</i> ,)	
)	
Defendants.)	
STATE OF NEW JERSEY)	
)	ss:
COUNTY OF MERCER)	

DAVID MACK, of full age, being duly sworn accord-
 ing to law, deposes and says:

1. I am Acting Administrator of the New Jersey Spill Compensation Fund, and have held this position since February 1986. As Acting Administrator, I am responsible for general supervision of the Fund's activities. I served as Deputy Administrator of the Fund from December 1985 until I assumed the position of Acting Administrator. Prior to my employment at the Spill Fund, I was a regulatory officer in the Office of Regulatory Services of the New Jersey Department of Environmental Protection (NJDEP). One of my responsibilities as a regulatory officer was to monitor the Spill Fund's activities. I also have been heavily involved in New Jersey's hazardous waste cleanup program since 1980, including involvement in negotiating contracts and cooperative agreements under the federal Superfund program between NJDEP and the United States Environmental Protection Agency ("USEPA"). I hold a bachelor's degree from Lehigh University (1974) and a J.D. from the New England School of Law (1978).

2. I was Acting Administrator of the Spill Fund when the decision of the United States Supreme Court in *Exxon v. Hunt* was issued on March 10, 1986. In light of the partial preemption decision, the Fund moved immediately to conform its expenditures to the requirements of the decision. This task has not been an easy one from an administrative point of view because the general holding of the Court does not answer the myriad questions relating to the practical application of the decision. Where certain expenditures are arguably preempted, however, we have decided not to authorize Spill Fund moneys to pay such costs. The Fund has thus established categories of

preempted costs (as further described in the remainder of this affidavit) and is proceeding to function with these categories severed from the remaining, clearly nonpreempted uses of the Fund.

3. Under the National Contingency Plan ("NCP") USEPA may draw upon Superfund dollars to finance emergency removal activities. USEPA presently makes determinations as to the eligibility of an emergency for such federally financed response on a case by case basis. Additionally, USEPA and NJDEP are negotiating a Memorandum of Understanding which would establish a protocol for determining when an emergency was eligible for a Superfund financed removal. Where USEPA rejects an emergency as ineligible for Superfund coverage, the Spill Fund will finance it as a nonpreempted expenditure. Until official USEPA rejections are received, NJDEP—in light of the Supreme Court decision—is now funding emergency removals from an appropriation made available by the Legislature for cleanup work at hazardous waste sites. This appropriation, known as the "capital account," from general revenues resulted from New Jersey's budget surplus of Fiscal Year 1985, amounted to \$150 million, and has no preemption restrictions whatsoever.

4. Where expenditures for emergency removal actions not specifically declared ineligible for Super Fund financing or for NPL sites beyond the State share had been approved by NJDEP but not paid as of March 10, 1986, we went ahead and paid them out of the Spill Fund in order to satisfy our obligations to vendors. Since March 10, 1986, NJDEP has been reimbursing the Spill Fund for those expenditures out of the capital account to accommo-

date the decision of the Supreme Court, and to be consistent with the spending guidelines outlined above.

5. As to sites on the National Priority List ("NPL"), we are restricting Spill Fund expenditures to the authorized State share of remedial costs which is 10% for most sites, and 50% for sites owned or operated by the State or its political subdivisions. Any other State expenditures at NPL sites are currently being drawn from the capital account discussed above.

6. The Spill Fund has taken the above actions even though we question whether they are strictly necessary under the Court's decision. As noted in the majority opinion of Justice Marshall, the federal taxing authority for Superfund expired on September 15, 1985. USEPA has since been unable to finance much needed cleanup work at NPL sites in New Jersey. Although the Spill Fund had advanced some money to USEPA for remedial actions at NPL sites to cover the shortfall in federal dollars, and in anticipation of eventual reimbursement from USEPA once Superfund was reauthorized by Congress, we have shifted such advance funding to the capital account pending a decision as to whether such expenditures are preempted. We have also shifted to the capital account expenditures for remedial and emergency-type actions at NPL sites where USEPA has declined to make funds available—such as the installation of water pipe lines to provide alternate water service to people whose wells have been contaminated. Although we question whether such expenditures are preempted, we will continue to finance these costs from non-Spill Fund sources until the issue is resolved.

7. The Spill Fund has continued to finance all categories of costs not preempted by the Supreme Court decision. These categories include the State Superfund share of 10% or more of remedial costs at NPL sites, remedial activities and related costs at sites not on the NPL, third-party damage claims, and the administrative costs of Spill Fund. Expenditures for all of these categories are expected to escalate sharply in the next few years as NJDEP implements a five-year plan for hazardous waste response activities in the State, and the Spill Fund expands its staff to improve its record of recoveries from responsible parties and its compensation of outstanding, backlogged third-party damage claims. The Spill Fund thus anticipates being able to use all of the current annual tax revenues for nonpreempted uses, and will even need the revenues from an increased tax rate if NJDEP's five-year cleanup goals are to be accomplished. For a detailed discussion of NJDEP's anticipated financing needs from the Spill Fund and other sources, see the affidavit of Michael F. Catania, Deputy Commissioner of NJDEP.

8. As Acting Administrator of the Spill Fund since the issuance of the *Exxon v. Hunt* decision by the Supreme Court, I am familiar with Exxon's requests for discovery from the Spill Fund. I have become concerned about these requests because Exxon essentially has asked for a superficial accounting of past expenditures which, in my opinion, does not reflect all of the factors relevant to a determination of preemption. For example, Exxon has asked for a list of expenditures at sites on the NPL from December 1980 to the present. This information was provided, but it should be noted that the costs listed include

expenditures contracted for a paid prior to listing on the NPL, expenditures contracted for prior to listing on NPL but paid after listing, administrative charges billed directly to the project account, costs later reimbursed by EPA for advanced funding, costs EPA declared to be ineligible for funding and costs which may be credited in the future against the State's mandated 10% share. Our records reveal the date on which invoices are paid, but not the date on which the work was contracted for or actually performed. If cleanup activities were performed under contract with a vendor prior to the listing of a site on the NPL, but paid after the listing, it would seem to me that the cost should not be viewed as a preempted one since it was incurred prior to the site becoming eligible for Superfund financing. To discover the date of performance, however, every invoice would have to be examined. Such an undertaking is staggering in terms of time and resources when 99 New Jersey sites—the number currently on the NPL—are involved. At *least* 1,800 invoices would have to be scrutinized. Indeed, the Spill Fund would have to hire either a contractor or new staff to perform this lengthy task. Additionally, these invoices would have to be scrutinized to determine whether non-preempted costs such as administrative costs had been included. Before undertaking such a detailed accounting, therefore, it would be vastly preferable from my point of view to have legal issues decided that possibly could avoid the need for the detailed accounting.

/s/ David C. Mack
DAVID MACK

Sworn and subscribed to before me
this 15 day of July, 1986.

/s/ Nancy B. Stiles
Attorney at Law
State of New Jersey
